IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2716 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GULAMKADAR PIRMOHMMAD SHAIKH

Versus

ABDULLAMIYA ABDULKARIM

Appearance:

1. Special Civil Application No. 2716 of 1982

MR SH SANJANWALA for Petitioner No. 1-4

MS VASUBEN P SHAH for Respondent No. 1-2

MR BHARAT J SHELAT for Respondent No. 3

MR SN SHELAT for Respondent No. 4-6

MS MANISHA LAVKUMAR, AGP for Respondent No. 7

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 20/11/2002

ORAL JUDGEMENT

In this petition under Articles 226 and 227 of the Constitution, four tenants of Sagrampura Moti Masjid

Trust at Surat have challenged the judgment and order dated 21.6.1982 of the Gujarat Revenue Tribunal allowing Appeal No. TEN.A.S. 5 of 1981 against the order dated 16.1.1980 passed by the Joint Charity Commissioner, Vadodara in Application No. 36/167/79, setting aside the order passed by the Joint Charity Commissioner granting permission to grant lease of the land in question for 90 years and remanding the matter to the Joint Charity Commissioner to hold a fresh inquiry after following proper procedure and after issuing notices to both the parties to decide the matter in accordance with law.

2. The land in question, admeasuring 732 sq. yards is situate in Sagrampura ward of Surat city. The trustees applied to the Joint Charity Commissioner under Section 36 of the Bombay Public Trusts Act, 1959 (hereinafter referred to as "the Act") for sanction of lease of the land in question to the present petitioners on the ground that the petitioners were paying monthly rent of Rs.600/- in the aggregate and since the petitioners were protected under the provisions of the Bombay Rent Act, it would be difficult to recover possession and that the petitioners wanted to put up construction on the vacant land in question and pay the trustees monthly rent of Rs.1000/in the aggregate. That application made on 8.11.1979 is at Annexure "A" to the petition. The prayer in the application was to grant permission to the trustees to grant the land on lease to the petitioners for a period of 10 years as per the draft lease deed.

By a public notice dated 21.12.1979 published in Gujarat Samachar dated 24.12.1979, the public at large were informed that the four petitioners herein were sitting tenants of the land in question paying monthly rent of Rs.600/- and the trustees had resolved to grant the said land to the said tenants at a monthly rent of Rs.1000/- for a period of 90 years renewable every ten years with liability to pay enhanced rent to the extent of 25% upon every renewal and that was the main term of the lease deed; the trustees had made the application for such permission and any one who had objections to any such sanction being granted may lodge his objections before the Joint Charity Commissioner, Vadodara. The notice further stated that if no objections were received, further proceedings for granting sanction under Section 36 of the Act for granting lease for a period of 10 years shall be continued. Ultimately, after hearing the trustees and the petitioners herein, the Joint Charity Commissioner passed order dated 16.1.1980 (Annexure "D") allowing the application and permitting

the trustees to give on lease the land admeasuring 732 sq. yards in property nondh No. 317 and 318 to the present petitioners at a monthly rent of Rs. 1000/- for a period of 90 years with a stipulation that there shall be increase of 25% in rent at the interval of every 10 years. Consequential order dated 19.1.1980 was also passed by the Joint Charity Commissioner. It appears that pursuant to the said permission, lease deed dated 27.6.1980 was executed by the trustees in favour of the present petitioners permitting the petitioners to put up construction on the land in question and also permitting the petitioners to sell such constructed property on ownership basis or to let out such constructed property. Clause 3 of the lease deed further provided that although the period of lease was from 1.6.1980 to 31.5.1990, on expiry of the ten year period, if the tenants were ready and willing to have the property continued on lease, upon their consent to give 25% additional rent, the trustees shall be liable to extend the period of lease for a further period of ten years and upon such increase every ten years, the tenants were entitled to have the lease renewed till 31.5.2070.

Thereafter, respondent Nos. 1 and 2 herein challenged the order of the Joint Charity Commissioner by filing an appeal before the Gujarat Revenue Tribunal. The appeal was contested firstly on the ground that it was filed beyond the prescribed period of limitation of 30 days as prescribed by sub-section (3) of Section 36 of the Act and also on merits. The Tribunal rejected the contention that the Tribunal had no power to condone the delay in filing the appeal, the Tribunal found sufficient cause for condoning delay and on merits the Tribunal found that proper inquiry was not made by the Joint Charity Commissioner; the Joint Charity Commissioner did not record any evidence whatsoever and disposed of the application in a perfunctory manner only on the basis of the averments made in the application and the replies given by the trustees in answer to the queries raised by the Joint Charity Commissioner. The Tribunal accordingly allowed the appeal and set aside the order of the Joint Charity Commissioner and sent the matter back to the Joint Charity Commissioner to hold a fresh inquiry after following proper procedure and after issuing notices to both the parties to decide the matter in accordance with law.

It is the aforesaid judgment and order of the Tribunal which is under challenge in this petition.

3. Mr SH Sanjawala, learned counsel for the

petitioners has raised the following contentions :-

(i) The Tribunal erred in entertaining the appeal although it was filed beyond the prescribed period of limitation and the Tribunal had no power or jurisdiction to condone the delay in filing the appeal, firstly because the Tribunal is not a Civil Court to which alone the provisions of the Limitation Act, 1963 apply. Secondly, the Bombay Public Trusts Act, 1950 is a complete code in itself and, therefore, in any view of the matter, the provisions of Section 29(2) of the Limitation Act are by necessary implication excluded in the matter of appeals under Section 36(3) of the Public Trusts Act.

(ii) Even otherwise, the Tribunal ought not to have condoned the delay in filing the appeal as the beneficiaries were aware of the fact that the petitioners had organized a function to commence the construction of the property on the land in question.

(iii) The order dated 16.1.1980 of the Joint Charity Commissioner was legal and valid in the facts and circumstances of the case as the petitioners are sitting tenants. Earlier they were paying only Rs.600/- per month as rent and now they were to pay rent at Rs.1000/- per month and, therefore, the trust was going to benefit.

4. On the other hand, Mr SB Vakil and Mr AM Kapadia, learned counsel for the trustees, particularly the applicants in Civil Application No. 9026 of 1997 and 5037 of 2002 respectively, have opposed the petition and submitted that the petitioners had played a fraud for obtaining the Joint Charity Commissioner's sanction under Section 36 of the Act and the Tribunal had rightly interfered with the same. It is further submitted that the Tribunal did have the jurisdiction to condone the delay in filing the appeal and in any case this Court should not exercise its discretionary writ jurisdiction under Articles 226 or 227 of the Constitution to interfere with the order of the Tribunal, otherwise it would amount to restoration of the illegal order passed by the Joint Charity Commissioner.

5. Ms Manisha Lavkumar, learned AGP for the Charity Commissioner has supported the order of the Tribunal and submitted that the Tribunal does have the power to condone the delay in filing appeals under Section 36(3).

It is also submitted that since the order passed by the Tribunal is just and proper and merely an order of remand is passed, no injustice has been caused to any party.

6. Having heard the learned counsel for the parties, it appears to the Court that the question whether the Gujarat Revenue Tribunal has the power to condone the delay in filing an appeal under sub-section (3) of Section 36 of the Act cannot be said to be free from difficulty. However, for the reasons stated hereinafter, this Court is not inclined to go into that question as this is not a fit case for exercising the discretionary prerogative writ jurisdiction of this Court under Articles 226 and 227 of the Constitution.

7. The Tribunal has observed in para 14 of its order that earlier the land in question was let out to one Mr JV Mistry at a monthly rent of Rs. 200/- per month for a period of 10 years. The said tenant handed over possession of the land in question to the trustees on 20.7.1979 (kabja receipt is at page 91 of the record in appeal) and thereafter the trustees let out the premises to the present petitioners at a monthly rent of Rs.600/per month from 1.8.1979 vide receipt at page 95 of the record in appeal. The Tribunal has then observed that of course the trustees could create the lease for a period not exceeding three years, but while the trustees made the application dated 8.11.1979 on the ground that the premises were with the tenants and could not be vacated, the trustees did not disclose that they had obtained possession of the land from Mr Mistry on 20.7.1979, and that the alleged lease was created in favour of the present petitioners on 1.8.1979 and very soon thereafter made the present application on 8.11.1979. If the trustees had disclosed this material fact, the Joint Charity Commissioner would not have come to the conclusion that the trustees had no other option but to let out the premises to the present petitioners for 90 years. Former tenant Mr JV Mistry was carrying on business of a saw mill on the land in question and the present petitioners were not carrying the said business but they wanted to construct a high rise building on the land and sell out the flats and shops on ownership basis. If the petitioners herein are permitted to dispose of such flats and shops to different persons on ownership basis, the trustees would not be in a position to enforce the terms of the lease. Apart from this aspect, the fact also remains that the public notice dated 21.12.1979 published in the newspaper on 24.12.1979 merely stated that the trustees had resolved to grant lease of the land in question to sitting tenants at a monthly rent of

Rs.1000/- as against the present rent of Rs.600/- and the lease was to be granted for a period of 90 years. The public notice did not state that the lease deed would permit the tenants/prospective tenants to put up construction on the land in question and to sell out/let out the property to be so constructed. The last para of the notice even stated that if no objections were received, the proceedings under Section 36 of the Act for granting permission to execute the lease deed for a period of 10 years would be considered.

8. A bare perusal of the said public notice would lead one to believe that the property was to be let out to sitting tenants for a period of 10 years at a monthly rent of Rs.1000/- as against the existing rent of Rs.600/-. If the fact that the trustees were to permit the tenants/prospective tenants to put up construction on the land in question and to sell out/let out the property had been made known to the public at large, definitely better offers would have been received. This would be by itself a sufficient ground for not interfering with the order of the Tribunal remanding the matter back to the Joint Charity Commissioner. Moreover, the order of remand was passed by the Tribunal as far back as in June, 1982 and the present petition has remained pending before this Court for the last 20 years. The learned counsel for the trustees state that after expiry of the lease period on 31.5.1990, the lease has not been renewed in favour of the petitioners. It would, therefore, be in the fitness of things if the Joint Charity Commissioner considers the matter afresh after considering whether the petitioners were inducted as tenants bona fide and in light of the situation presently prevailing.

9. In Hamumiya bachumiya vs. Mehdihusen Gulamhusen, 19 GLR 661, this Court has held as under :-

> "The power of the trustees of such religious trust to alienate property of the religious endowment was analogous to that of a manager for an infant. A trustee was not entitled to sell property for the purpose of investing its price so as to bring the income larger than that derived from the property itself. In the instant case, there was no question of any such compelling unavoidable necessity for the alienation and the ground on which sanction was sought was only on the ground of benefit of the estate as interpreted in several proceedings as laid down by the judicial decisions. Such

religious trust properties could not be easily sold away on such grounds as the trust in such fast developing city like Baroda where the prices were continuously rising would be deprived of the benefit of enhancement in future in view of the lands leased to the tenant.

In charities, court as constitutional protectors of all charities is the sole guardian of the paramount interest of the charities and its jurisdiction is analogous to one as a protector of the infant. Under the scheme of the Bombay Public Trusts Act, sec. 80 has taken away the jurisdiction of the Court in matters where the authorities are prescribed in the Act for dealing with these questions. The Charity Commissioner would have, therefore, to exercise its jurisdiction by making an inquisitorial enquiry so that public interests of such public trust are properly served. The trustees or the members of the Jamat may be fighting between themselves and personal interest of the trustee or the prominent members of the Jamat could never be allowed to have any place in the matter of alienations of such public trust properties where the Crown or now the Charity Commissioner or the Court under Sec. 80 have been invested with the jurisdiction as protector of the charities. Even in view of Rule 24(1) an application for sanction would have to be considered by the Charity Commissioner by considering the paramount interest of the trust and not on the fleeting interest of the trustees or of the beneficiaries. The whole scheme of the Bombay Public Trusts Act specially enacted for making better provision in the administration of public religious trust in the State is to give such lis the character of a public oriented litigation where the Charity Commissioner and the Court which act under the Act have to act as protector of the public charities. In such litigation on the analogy of adversary litigation the principles properly applicable to such private litigation could never have any prevailing operation as that would defeat the very public purpose underlying such enquiries."

10. From a perusal of the order of the Joint Charity Commissioner and also from the observations made by the Tribunal, it appears that the Joint Charity Commissioner has not examined the need of the trust for granting the lease in favour of the petitioners herein on the terms

contained in the lease deed. The Joint Charity Commissioner has not examined whether the petitioners are bona fide tenants of the respondent-trust and whether the interest of the trust would be served by permitting the petitioners to put up construction on the land in question and to sell out/let out the same to the third parties without any benefit accruing to the trust except the meagre increase in rent from Rs. 600/- to Rs.1000/per month from all the four petitioners taken together.

11. In Roshan Deen vs. Preeti Lal, (2002) 1 SCC 100, the Hon'ble Supreme Court has observed as under :-

> "Time and again this Court has reminded that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it (vide State of U.P. v. District Judge, Unnao, AIR 1984 SC 1401). The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The lookout of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law."

The question whether the Gujarat Revenue Tribunal had power to condone the delay in filing the appeal under sub-section (3) of Section 36 of the Bombay Public Trusts Act is, therefore, not required to be examined in view of the aforesaid findings given by the Tribunal. Even if one were to come to the conclusion that the Tribunal had no such power to condone the delay, the Apex Court has held that if justice has become the by-product of an erroneous view of law, the High Court is not expected to erase just justice in the name of correcting the error of law.

12. For the reasons aforesaid, the petition deserves to be dismissed and is accordingly dismissed. The Joint Charity Commissioner shall consider the matter afresh in light of the observations made in the judgment of the Gujarat Revenue Tribunal and the present judgment.

Rule is discharged with no order as to costs.

On the question as to who are the present trustees, it will be open to the Joint Charity Commissioner to decide the matter in accordance with law in light of the situation presently prevailing.

(M.S. Shah, J.)

sundar/-